

**IN THE LEGAL PRACTITIONERS  
DISCIPLINARY TRIBUNAL**

**ACTION NO 1 of 2015**

**IN THE MATTER OF:**

**THE LEGAL PRACTITIONERS ACT, 1981**

**and**

**MADDALENA ROMANO**

**DECISION ON PENALTY AND COSTS**

**Orders made**

1. The Tribunal reprimands the Practitioner and orders her to pay:
  - i) a fine of \$6000.00; and
  - ii) 50 percent of the reasonable costs of the Commissioner, such costs to be agreed, and failing agreement to be taxed.
  
2. The decision of this Tribunal to not make a finding of unprofessional conduct in the terms contended for by the Commissioner was upheld on appeal by the Full Court of the Supreme Court of South Australia in *Legal Profession Conduct Commissioner v*

*Romano*.<sup>1</sup> The Tribunal sets out its reasons for the penalty imposed in respect of the finding of unsatisfactory conduct made by the Full Court,<sup>2</sup> and the costs order in these reasons. The abbreviated terms used in the substantive reasons dated 8 November 2016 are repeated herein. The basis of the finding of unsatisfactory conduct, to which the penalty relates, is addressed in the Full Court judgment.

### Submissions of parties

3. The Commissioner submitted that the Tribunal:
  - i) reprimand the Practitioner;
  - ii) impose a condition on the Practitioner's practising certificate requiring her to have a legal aid commitment certificate countersigned by another senior legal practitioner (of not less than 10 years post admission experience), such condition to operate for a period of 12 months commencing on the day the Practitioner first accepts a legal aid assignment following the delivery of the decision of this Tribunal on penalty;
  - iii) impose a fine "in the region of \$12,000.00"; and
  - iv) make a costs order in the Commissioner's favour.
4. The Practitioner submitted that the appropriate penalty should be a reprimand, and in the event the Tribunal imposes a fine, then any fine imposed ought to be "much less than \$12,000.00". The Practitioner contests the power of the Tribunal to impose a fine. The Practitioner further contends that the imposition of a condition on the Practitioner's practising certificate in the terms sought by the Commissioner is inappropriate. The Practitioner also sought a costs order in her favour.

### Consideration

#### Penalty

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<sup>1</sup> [2017] SASCFC 167, at [9].

<sup>2</sup> *Ibid* at [10], [82]-[84].

5. Considerations that govern the imposition of penalty in such matters are well settled. Disciplinary proceedings against a legal practitioner are concerned with the protection of the public; the object is not to punish the practitioner but to protect the public and to maintain proper standards in the legal profession.<sup>3</sup>
6. In *Law Society of New South Wales v Foreman*,<sup>4</sup> Giles AJA described the protective function of general deterrence (albeit in different circumstances) in the following terms that are apt:

"...the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them. And the public, and professional colleagues who practise in the public interest, must be able to repose confidence in legal practitioners, so an element in deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with."
7. It follows that the Tribunal's role is both protective and educative in publicly marking the seriousness of what the instant solicitor has done. Further, in *Law Society of New South Wales v Walsh*,<sup>5</sup> it was said that the duty to protect the public is not confined to the protection of the public against further misconduct by the particular practitioner who is the subject of disciplinary proceedings. It also extends to protecting the public from similar defaults by other practitioners.
8. The above considerations should inform the Tribunal's response to the infraction, not overlooking the need for due proportionality. The Tribunal must give proper weight to widely and reasonably held public attitudes to practitioners within the context of the administration of justice generally, as well as within the context of the particular facts of the case in question. To do less would be to abandon the underlying functions of the Tribunal's disciplinary jurisdiction.
9. The conduct which has been found to be unsatisfactory can only be described as serious. One cannot ignore the words of the Full Court in this matter: "Ms Romano's failure to properly examine and remind herself of the circumstances of the file on which

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<sup>3</sup> *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 250-251; *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456.

<sup>4</sup> (1994) 34 NSWLR 408 at 471 (*Foreman*).

<sup>5</sup> [1997] NSWCA 185.

the claim was made was a gross departure from the standard of professional work expected of a legal practitioner<sup>6</sup>. The conduct involved "a level of carelessness which amounted to unsatisfactory conduct" regarding fundamental obligations that a solicitor owes to the LSC in respect of legal aid claims that are lodged with it.<sup>7</sup> Such claims involve an impost on public monies.

10. That said, the Tribunal's finding of honesty on the part of the Practitioner in her dealings with the LSC is undisturbed by the Full Court. Further, there is no suggestion (apart from the matters the subject of the charge) of persistent disregard by the Practitioner of her obligations to the LSC. So far as the conduct underpinning the "unsatisfactory conduct" finding is concerned, this was a case of a Practitioner who, albeit "facilitat[ing] the making of a claim on the limited public resources of the LSC for legal work she had not performed and for a medical disbursement which had not been incurred<sup>8</sup>, was doing so within a compacted time frame during which she "completed the certificate and drafted the letter making the claim ... without actively turning her mind to the matter on which the claim was made"<sup>9</sup>, relying instead (as she asserted) on what has been found to be a careless course of conduct either of not reading the relevant documents before signing them or relying upon a process of checking and verification to be carried out by others rather than herself.<sup>10</sup>
11. Still further, the Practitioner's conduct (the subject of the charge) occurred in circumstances where the Practitioner was working extremely long hours to keep up with the demands of her very heavy workload without effective supervision at a time when she was also trying to close her files or otherwise make them ready for transfer to a (yet to be identified) replacement solicitor prior to leaving the firm.
12. Additionally, the Practitioner has been the subject of investigation for several years now by the police, Andersons, the LSC, and the Conduct Board since the matters the subject of the charge came to light. The Tribunal has psychological assessment evidence before it about the Practitioner's precarious mental state, including the expressed opinion that:

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<sup>6</sup> Full Court's reasons at [10].

<sup>7</sup> Full Court's reasons at [79]-[83].

<sup>8</sup> Full Court's reasons at [10].

<sup>9</sup> Full Court's reasons at [83].

<sup>10</sup> See Full Court's reasons at [78].

"it was the cumulative effects of long-term sleep deprivation, with minimal respite from her stress and work pressures, which had had a deleterious impact on Ms Romano's cognitive functioning (e.g. memory, concentration, and attentional processes) during that period of time"<sup>11</sup>.

13. While none of these matters can be proffered as excuses for the Practitioner's charged conduct, the context cannot entirely be set to one side.
14. There is no reason, in the Tribunal's view, to expect a recurrence of the type of unsatisfactory conduct on the part of the Practitioner that occurred in the present case. The Tribunal has formed this view having observed the Practitioner over several days giving evidence before the Tribunal, and hearing and reading positive references about her character and honesty including by senior lawyers from Andersons.
15. First, as to the condition sought by the Commissioner, the Practitioner is presently not on the LSC Panel having been excluded from it by the LSC in 2012 when matters related to the present charges came to light. The Tribunal sees no reason to doubt the Practitioner's assurance that she does not intend to apply to be on the LSC Panel in the future. The Tribunal considers it appropriate to act on the basis of the assurance given by the Practitioner through her senior counsel.
16. Given the positive findings made by this Tribunal about the Practitioner's integrity, the Tribunal has no reason to doubt the Practitioner will act in future in accordance with the assurance given by her. Further, the Tribunal found the Practitioner gave honest evidence before this Tribunal and was honest at the relevant times in her dealings with the LSC with respect to matters related to the charges. Nothing has been put before the Tribunal on the issue of penalty that in any way adversely affects the positive findings made by this Tribunal about the Practitioner's character, including her integrity. The Full Court did not disturb these findings. Senior lawyers at Andersons where the Practitioner was employed before and at the time of the conduct the subject of the charge gave evidence to the effect that the Practitioner was an honest and diligent lawyer highly regarded by the Andersons lawyers and clients she had contact with. A recent reference provided by a former South Australian Magistrate which was tendered into evidence on behalf of the Practitioner also speaks positively about the Practitioner's character. The

Practitioner made recompense to Andersons of her own volition as soon as the matters the subject of the charge came to light.

17. Further, should the Practitioner seek at some later point in time to be listed on the LSC Panel, she would at that stage face the hurdle of establishing to the LSC's satisfaction that she is fit to be on such a list. We accept that there may be cases in which it would be inappropriate for this Tribunal to act on the basis of the type of assurance proffered. This is not such a case. The Commissioner's submission that the LSC is not there to "police" persons in the position of the Practitioner is not to the point.
18. Second, the Tribunal is of the view that it has the power to impose a fine in this matter and that in this case the public interest is served by imposing a significant fine on the Practitioner that is reflective of the gravity with which such lapses ought to be seen.
19. The charges relate to the period March and April 2012. In March and April 2012, s 82(6)(a)(iii) relevantly provided that the Tribunal had the power to impose a fine not exceeding \$10,000.00 on a person found guilty of unprofessional or unsatisfactory conduct. Section 82(6a) stated that such a fine may not be imposed if a practitioner was found guilty of only of unsatisfactory conduct.
20. The Practitioner contends that the later amendment of s 82 by the *Legal Practitioners (Miscellaneous) Amendment Act 2013* (the **Amending Act**), which made available the power to fine up to \$50,000.00 in respect of unsatisfactory conduct,<sup>12</sup> is not available to this Tribunal in respect of conduct that occurred prior to the commencement of the Amending Act because of the terms of the Amending Act. The Practitioner contends that there is a presumption that where the legislature has increased the jeopardy to which a person may be subject that existed at that the time of the commission of the offence/infraction, the increase would not apply unless such an intention is clear from the amending legislation. The Practitioner submits that the Amending Act does not display a clear intention to apply the relevant provision of the Amending Act to the conduct in this case, which occurred prior to the relevant amendment.

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<sup>12</sup> Amending Act, s 47.

21. Relevant for present purposes, the Amending Act has the effect that the Tribunal was empowered to fine up to \$50,000.00 in respect of findings of unsatisfactory conduct.
22. The Tribunal is of the view that it has the power to impose a fine in the present case and that such an express intent is manifest in the Amending Act.
23. Paragraph 14(1) of Schedule 2 of the Amending Act expressly provides that the amendments to the Principal Act, including the amended version of s 82(6), applies to the proceeding in the Tribunal. It provides:

**"14—Application of principal Act as amended to complaints, investigations, disciplinary proceedings and conduct**

(1) Subject to this Schedule, the principal Act as amended by this Act applies in relation to—  
(a) any complaint received by the Commissioner or for which the Commissioner has assumed the conduct; and  
(b) any investigation commenced or continued by the Commissioner; and  
(c) any **disciplinary proceedings** commenced by the Commissioner, the Society or another person or for which the Commissioner has assumed the conduct, whether the conduct to which the complaint, investigation or **proceedings relates occurred before or after the relevant day.**"<sup>13</sup>

24. The Tribunal is of the view that the reference to "disciplinary proceedings" in paragraph 14(1)(c) applies to proceedings before the Tribunal under Division 4 as well as proceedings in the Supreme Court under Division 5 of Part 6 of the Act. This is consistent with provisions contained within Division 4 that refer to "proceedings" in the Tribunal (including ss 84(1)(a), 84(2), 84A(3), 84B, 84C(1), 84C(2) and 85(2)). Any other construction of "disciplinary proceedings" would lead to an illogical gap in paragraph 14(1) contrary to the evident intention of the legislature.
25. The seriousness of the unsatisfactory conduct does merit the imposition of a fine, not least due to the objectives referred to above of protection of the public and public monies, and sending the appropriate messages to the public and other practitioners. So far as doing that from the perspective of the Practitioner, the Tribunal is satisfied that she has "learned her lesson" about how to act even in situations of overwhelming pressures.

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<sup>13</sup> Emphasis added.

Further, the Practitioner has had this matter hanging over her for some 6 years, during much of that time being under the shadow, effectively, of allegations of participation in forgery and fraud. So far as the perceptions of the relevant others are concerned, and taking into account the quantum of fines imposed in cases brought to the Tribunal's attention, and the circumstances surrounding them, the Tribunal's view is that an amount of \$6000 would be regarded as neither insubstantial nor insignificant, but rather a sufficient marker of the seriousness of the unsatisfactory conduct. Both parties relied on other cases and urged the Tribunal to consider imposing similar penalties as those imposed in those cases. While precedents must be given proper heed, care must be taken to ensure that each case is considered on its own facts when imposing penalty. For example, the Practitioner, unlike Scragg<sup>14</sup> has displayed appropriate insight into and regret for the careless conduct the subject of the findings of this Tribunal and the Full Court.

26. Accordingly, the Tribunal is of the view that a fine of \$6000.00 properly reflects the gravity with which the Practitioner's unsatisfactory conduct is being viewed by this Tribunal and serves the protective purpose of such disciplinary proceedings in the terms discussed above.

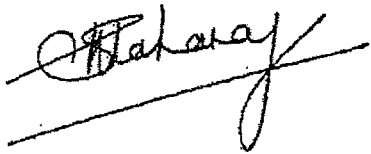
#### Costs

27. The Tribunal orders that 50% of the costs of the Tribunal proceedings of the Commissioner be paid by the Practitioner, as a substantial part of the proceedings before the Tribunal was involved in hearing evidence on, and debate about whether the conduct the subject of the charge involved dishonesty on the part of the Practitioner. After leading several witnesses, and extensive cross examination of the Practitioner, the Commissioner failed to prove dishonesty on the part of the Practitioner. The Commissioner ultimately also failed to prove the charge of unprofessional conduct against the Practitioner. These two topics, particularly the allegation by the Commissioner of dishonesty on the part of the Practitioner, occupied the majority of the hearing time in the Tribunal. Further, the Practitioner had fairly early in the proceedings admitted most of the physical acts alleged against her as particulars of the charge.

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<sup>14</sup> Tribunal Action no 7 of 2016 (14 June 2017) referred to in the Commissioner's written submissions on penalty dated 8 February 2018.

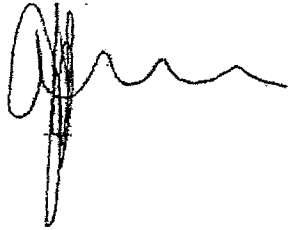




S J Maharaj QC

Deputy President

28 June 2018



R Kennett



Professor G Davis